Hong Leong Bank Bhd v Jeyaprakash Pillay a/l Jegaualthan and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-04(IM)(NCC)-320–10 OF 2014 AND W-04(IM)(NCC)-330–10 OF 2014

ALIZATUL KHAIR, LIM YEE LAN AND NALLINI PATHMANATHAN JJCA

25 APRIL 2016

Hire Purchase — Hire purchase agreement — Allegation that agreement was void — Respondent entered into hire purchase agreement with appellant to purchase used vehicle — Vehicle seized by customs for non-payment of customs duty — Respondent refused to pay instalments of facility to appellant and claimed agreement void — Whether appellant liable for loss of quiet possession of vehicle — Whether appellant obliged to pay customs duty

The hirer ('the respondent') decided to purchase a used car and approached the financier ('the appellant') for financing. The appellant granted the financing and a hire purchase agreement was duly executed between the parties. Subsequently, the vehicle was seized by the customs for non-payment of customs duty and consequently, the respondent refused to pay any further monthly instalments to the appellant. The respondent brought an action against the appellant at the sessions court demanded refund of the instalments paid and argued that the hire purchase agreement had been rendered void as the appellant had failed to deliver good title to the vehicle. The claim was dismissed by the sessions court. However, the High Court reversed such decision and held that the hire purchase agreement was void and unenforceable and that the instalments paid by the respondent were to be refunded to him. Nevertheless, the learned trial judge dismissed the respondent's appeal with regard to the refund of the deposit paid. In the present case, the primary appeal was brought by the appellant against the High Court order declaring that the hire purchase agreement was void and unenforceable and that all instalments paid under the agreement be refunded to the respondent. On the other hand, the respondent, by way of cross-appeal, appealed against the High Court order in dismissing his claim for refund of the deposit paid to the appellant.

Held, allowing the appeal by the appellant and dismissing the cross-appeal by the respondent:

(1) In the instant appeal, there was no wrong doing or failure attributable to the appellant in relation to the seizure of the car. If performance had indeed been made impossible, it was not by reason of any act or omission

of the appellant, but because of the intervention of a third party, namely the customs. Moreover, the respondent in the instant appeal was accorded the opportunity to regain possession of the car by paying the relevant taxes but he refused to do so. The respondent could not fault the financier for the loss of quiet possession of the vehicle. The respondent's recourse was against the dealer, not the appellant (see para 31).

(2) The financier in a hire purchase transaction does not, in the absence of a clear contractual provision, bear or undertake to bear customs duties or taxes for vehicles which are the subject matter of hire purchase agreements which it had agreed to finance. This does not accord with commercial reality. The duty or obligation to do so lies with the hirer or the dealer (see paras 43–44).

[Bahasa Malaysia summary

Pembeli penyewa ('responden') memutuskan untuk membeli kereta terpakai dan berjumpa dengan pembiaya ('perayu') bagi pembiayaan. Perayu memberikan pembiayaan dan perjanjian sewa beli dilaksanakan dengan sewajarnya di antara pihak-pihak. Kemudiannya, kenderaan dirampas oleh kastam kerana tidak membayar duti kastam dan akibatnya, responden enggan membayar apa-apa bayaran ansuran bulanan selanjutnya kepada perayu. Responden membawa tindakan terhadap perayu di mahkamah sesyen menuntut bayaran balik terhadap bayaran ansuran yang dibayar dan berhujah bahawa perjanjian sewa beli tersebut adalah terbatal kerana perayu gagal untuk memberikan hakmilik sah kepada kenderaan tersebut. Tuntutan tersebut ditolak oleh mahkamah sesyen. Walau bagaimanapun, Mahkamah Tinggi mengakas keputusan sedemikian dan memutuskan bahawa perjanjian sewa beli adalah batal dan tidak boleh dikuatkuasakan dan bahawa bayaran ansuran yang dibayar oleh responden dibayar balik kepadanya. Walau bagaimanapun, hakim bicara yang bijaksana menolak rayuan responden berkaitan kepada bayaran balik deposit yang dibayar. Dalam kes ini, rayuan utama yang dibawa oleh perayu terhadap perintah Mahkamah Tinggi mengisytiharkan bahawa perjanjian sewa beli adalah batal dan tidak boleh dikuatkuasakan dan bahawa kesemua bayaran ansuran yang dibayar di bawah perjanjian dibayar balik kepada responden. Sebaliknya, responden, melalui rayuan balas, merayu terhadap perintah Mahkamah Tinggi dalam menolak tuntutannya bagi bayaran balik deposit yang dibayar kepada perayu.

Diputuskan, membenarkan rayuan oleh perayu dan menolak rayuan balas oleh responden:

(1) Dalam rayuan ini, tidak terdapat kesalahan atau kegagalan disebabkan oleh perayu berhubung kepada perampasan kereta. Jika pelaksanaan sememangnya dibuat mustahil, ia bukan oleh alasan terhadap apa-apa tindakan atau ketinggalan perayu, tetapi kerana campur tangan pihak ketiga, iaitu kastam. Tambahan, responden dalam rayuan diberikan

peluang untuk mendapatkan balik milikan kereta dengan membayar cukai-cukai relevan tetapi enggan berbuat demikian. Responden tidak boleh menyalahkan pembiaya bagi kehilangan milikan aman terhadap kenderaan. Jalan keluar responden adalah terhadap peniaga, bukan perayu (lihat perenggan 31).

(2) Dalam ketiadaan peruntukan kontraktual jelas, pembiaya dalam transaksi sewa beli tidak menanggung atau membayar duti kastam atau cukai-cukai bagi kenderaan yang mana adalah perkara perjanjian-perjanjian sewa beli yang ia bersetuju untuk membiaya. Ini tidak selaras dengan realiti komersial. Kewajipan atau tanggungjawab untuk berbuat demikian terletak kepada penyewa atau peniaga (lihat perenggan 43–44).]

Notes

For cases on allegation that agreement was void, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 4995–4998.

Cases referred to

Ahmad Ismail v Malaya Motor Company & Anor [1973] 2 MLJ 66, FC (refd)
AmBank (M) Bhd v Pang Tee Chiang @ Phang Nyiok Pan and another appeal [2012] 1 MLJ 484; [2012] 1 CLJ 206, CA (refd)
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (refd)
Hong Leong Bank Bhd v Chee Kok Weng (Next Car Sdn Bhd (Third Party) & Chee Kok Weng (Fourth Party) [2012] MLJU 289; [2012] 8 CLJ 89, HC (refd)
Malayan Banking Bhd v Noor Aziah bt Ab Hana [2014] 6 MLJ 668; [2014] 6 CLJ 809, CA (refd)
Public Finance Bhd v Ehwan bin Saring [1996] 1 MLJ 331; [1996] 1 CLJ 628, HC (refd)

Legislation referred to

Civil Law Act 1956 s 15(3)
Contracts Act 1950 s 57(2)
Customs Act 1967 ss 115(1)(a), 128(1)(a), (2), 35(1)(g)
Hire Purchase Act 1967 s 7, 7(1)

Appeal from: Civil Appeal No 12ANCC–71–03 of 2014 (High Court, Kuala Lumpur)

Satish Nair (Satish Alli & Assoc) for the appellant.
S Balan (Azman Joseph & Assoc) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] An appeal and cross-appeal directed against the order of the High Court arose for consideration here in relation to a dispute between a hirer and a financier under a hire purchase agreement.

[2] Essentially, this dispute arose because the vehicle utilised by the hirer, one Jeyaprakash Pillay a/l Jegaualthan ('the hirer') was seized by the Royal Malaysian Customs ('the Customs') during the tenure of the hire purchase agreement.

[3] As a consequence, the hirer stopped all further hire purchase installments, terminated the hire purchase agreement and filed an originating summons in the sessions court, seeking the following reliefs:

(a) a declaration that the hire purchase agreement executed between the hirer and the financier was void and unenforceable;

(b) a refund of all instalments paid in the sum of RM26,430 together with interest;

(c) that the financier or dealer refund to the respondent the sum of RM36,970.05 together with interest; and

(d) that costs be borne by the dealer and the financier.

[4] The learned sessions court judge dismissed the reliefs sought by the hirer under the originating summons. The hirer appealed to the High Court against the decision of the sessions court.

[5] The High Court allowed the hirer's appeal in part. The learned High Court judge allowed the hirer's claim for a declaration that the hire purchase agreement executed between the parties was void and unenforceable and also ordered a refund of all installments paid under the agreement. However, the hirer's claim for a refund of the deposit paid to the dealer was dismissed.

[6] It is against the composite decision of the High Court that this appeal is now brought.

[7] The primary appeal is brought by the financier against the hirer in relation to that part of the High Court order declaring that the hire purchase agreement is void and unenforceable and that all instalments paid under the agreement be refunded to the hirer.

[8] Arising by way of cross-appeal is the appeal of the hirer, disallowing his claim for the refund of monies paid to the financier by way of a deposit for the vehicle.

[9] Both appeals were heard together as they arose from the same factual matrix. We allowed the appeal and dismissed the cross-appeal. In other words, we reversed the decision of the High Court on the primary appeal and dismissed the cross-appeal. The net effect was that the declarations and refunds sought by the hirer were dismissed. The hire purchase agreement was held to be valid and subsisting. We append below our reasons for so determining.

SALIENT BACKGROUND FACTS

[10] The hirer decided to purchase a used vehicle from a second hand car dealer known as Bestari Otomasi Sdn Bhd ('the dealer') (the dealer was named as the second defendant in proceedings in the sessions court but was not a party to the appeal in the High Court).

[11] The vehicle was a Volkswagen Passat 2.0(a) bearing chassis No WVWZZZ3CZBE759918, engine No CCZ161169 and registration No WWL3832.

[12] The hirer then approached the financier for financing. The financier consented to the grant of such financing and a hire purchase agreement was duly executed between the parties.

[13] The fact of the hirer having approached the financier is borne out by the hirer's declaration which reads as follows:

> I hereby voluntarily and solemnly declare that I had sourced for the vehicle myself and truthfully declare that the vehicle has the following condition(s): ... .
>
> Hence, I hereby request you to purchase the vehicle and to hire purchase the same to me.
>
> I also undertake and covenant to keep you indemnified and compensated from any losses, damages and expenses suffered and/or incurred by you if this declaration is found to be not accurate.

[14] The dealer also furnished a declaration and undertaking to the financier in the following terms:

> I hereby confirm that I am duly authorised and having legal rights to sell the above mentioned vehicle. I hereby voluntarily and solemnly declare that the above mentioned vehicle has the following condition(s):

I also undertake and covenant to keep you indemnified and compensated from any losses, damages and expenses suffered and/or incurred by you if this declaration is found to be not accurate.

[15] Consequently, the financier agreed to finance the hirer's purchase of the used vehicle whereupon hire purchase agreement bearing No 138–83–00769–8 dated 31 May 2012 was entered into. A sum of RM182,000 was duly disbursed for and on behalf of the hirer. The total amount of RM222,003.60 owed under the hire purchase agreement by the hirer was to be repaid by the hirer in 84 monthly installments, comprising 83 monthly installments of RM2,643 each and a final instalment of RM2,634.60.

[16] The salient terms of the hire purchase agreement provided, inter alia, as follows:

2. I agree

(a) to pay the deposit (which includes deposit in any forms other than cash) stated in item (ii) Part III of the Schedule in consideration of the option to purchase contained in Clause 8;

(b) to pay punctually and without previous demand the monthly instalments specified in Pat IV of the Schedule (hereinafter called 'instalment') or such revised monthly instalments and all other payments hereunder which is permitted by the Hire Purchase Act 1967 (hereinafter referred to as 'the Act') or the current prevailing legislation notwithstanding any defects, breakdown, loss of or damage to the Goods or for any reason whatsoever I shall not have the possession, control or use of the Goods;

(c) to punctually pay all licenses, fees, taxes, registration fees and all other outgoings payable in respect of the Goods or the user thereof; and

(d) to comply with and conform to all laws, by-laws, statutes, rules and regulations and instruction of the relevant authorities in connection with the Goods or the use thereof and to indemnity you on demand against any claims and costs whatsoever arising out of the use, operation or keeping of the Good or in any manner relating thereto.

[17] The vehicle was seized by the Customs on 17 May 2013 on reasonable suspicion that an offence had been committed under s 135(1)(g) of the Customs Act 1967.

[18] At the point of seizure, the hirer had paid installments totaling RM26,430. Thereafter the hirer refused to pay any further monthly instalments. He contended through his solicitors that as a consequence of the seizure of the vehicle by the Customs, the hire purchase agreement had been rendered void as the financier had failed to deliver good title to the vehicle. The hirer demanded a refund of the installments paid and the deposit paid to the

dealer of RM36,900 as well as a further sum of RM10,000 by way of general damages for purported breach of the hire purchase agreement.

[19] The financier responded through its solicitors maintaining, inter alia, that:

(a) any deprivation of quiet possession of the vehicle was not attributable to any act or omission on the part of the financier but was caused by the Customs or by the hirer in his dealings with the dealer;

(b) it was denied that the hire purchase agreement was rendered void and unenforceable; and

(c) the purported termination of the hire purchase agreement was invalid and the hirer was required to perform his continuing obligations under the hire purchase agreement, failing which the financier would take steps to enforce its rights under the agreement.

[20] The financier in the interim also wrote to the Customs asserting its ownership claim over the vehicle pursuant to ss 128(1)(a) and (2) of the Customs Act 1967 and sought a release of the vehicle pursuant to s 115(1)(a).

[21] The hirer next filed the originating summons dated 4 December 2013 (as outlined above) seeking the reliefs as specified above.

[22] The reliefs sought by the hirer were resisted by the financier in the following terms by way of affidavit in reply to the originating summons:

(a) the originating summons was misconceived because there was no obligation on the part of the financier to ensure that customs duties or other duties in respect of the vehicle had been paid. That duty or obligation fell upon the hirer who ought to have ensured that all duties had been paid prior to deciding to purchase the vehicle. In this context, the declaration and indemnity afforded by the hirer to the financier makes it evident that the hirer undertook this contractual obligation;

(b) it was the hirer who had breached the terms of the hire purchase agreement by refusing to pay any further installments after the seizure of the vehicle and by terminating the agreement vide his solicitor's letter of 28 May 2013;

(c) as such, the financier maintained that the hirer remained liable for the balance sum due and owing under the agreement of RM172,965.71. This was confirmed by a duly certified statement of account which, under the terms of the hire purchase agreement is conclusive a against the hirer; and

(d) the Customs had offered to the hirer vide letter dated 15 July 2013 that

he could retake possession of the vehicle by settling the unpaid customs duties. The hirer did not respond to this offer. In other words, the lack of possession of the vehicle is attributable to the hirer's failure or refusal to meet the customs duties required by the Customs.

[23] As stated at the outset, the originating summons filed by the hirer was dismissed by the sessions court on 10 March 2014, whereupon an appeal was lodged with the High Court. With respect to the financier's counterclaim against the hirer, the same was dealt with summarily and judgment recorded against the hirer in favour of the financier in the sum of RM172,965.71 together with interest and costs.

DECISION OF THE SESSIONS COURT

[24] In so determining, the learned sessions court judge succinctly and precisely held, inter alia, as follows:

Translation:

The question that arises is whether the obligation to ensure that customs duty was paid is that of the financier (the vehicle was seized by the Customs on the grounds that customs duty for the vehicle remained unpaid). If we consider the entirety of the terms of the hire purchase agreement between the hirer and the financier, there is no obligation on the part of the financier to ensure that all the customs tax or any other fees or duties are to be paid prior to entry into the hire purchase agreement.

If we refer to Clause 2 'I agree ... (f) to punctually pay all licences, fees, taxes, registration fees and all outgoings payable in respect of the goods or the user thereof;

(ii) To comply with and confirm to all laws, by laws, statutes, rules and regulations and instruction of the relevant authorities in connection with the goods or the use thereof and to indemnify you on demand against any claims and costs whatsoever arising out of the use, operation or keeping of the goods or in any manner relating thereto;

...

It is clear if we refer to the provisions above that it is the responsibility and obligation of the hirer to ensure that all payments that are mandatory under the law like customs duties are the responsibility of the plaintiff.

...

The vehicle was seized by the Customs on 17 May 2013 because customs duty was not paid prior to the vehicle being transferred to the hirer. This court agrees with the submissions of learned counsel for the financier that if there is any loss suffered it is a direct result of the omission of the hirer in not making the requisite customs duty payment that resulted in the vehicle being seized.

The negligence of the hirer in failing to make the customs duty payments resulting in the vehicle being seized ought not to be utilised by the hirer as a basis for a

declaration that the hire purchase agreement is void and unenforceable because title to the vehicle is no longer with the financier to be transferred to the hirer.

What disrupted possession to the vehicle is the failure of the hirer to pay customs duty and on that basis the customs offered the hirer possession of the vehicle provided the hirer paid a ten per cent deposit of the total customs duty of RM16,608.70 (total customs duty of RM166,086.91) while the balance ninety percent was to be paid by way of a general bond. However the hirer failed to do so.

As such the failure of the hirer to regain possession of the vehicle is a consequence of the hirer's reluctance or refusal to pay the customs duty.

THE DECISION OF THE HIGH COURT

[25] As stated at the outset, the High Court reversed the decision of the sessions court in part. In determining that the hire purchase agreement was void and unenforceable, and that the installments payments paid by the hirer until March 2013 were to be refunded to him, the learned High Court judge determined, inter alia, as follows:

(a) Her Ladyship relied on s 7 of the Hire Purchase Act 1967 which stipulates the conditions and warranties implied in every such agreement. In particular, the implied warranty of enjoyment and quiet possession of the subject goods was relied upon;

(b) the implied condition on the part of the owner that he had a right to sell the goods at the time when property passed was also cited;

(c) an implied warranty that the goods were to be free from any charge or encumbrance in favour of any third party at the time when the property is to pass; and

(d) Her Ladyship further relied on the case of *Hong Leong Bank Bhd v Chee Kok Weng (Next Car Sdn Bhd (Third Party) & Chee Kok Weng (Fourth Party)* [2012] MLJU 289; [2012] 8 CLJ 89 per Hamid Sultan Abu Backer (now JCA) that stipulated as follows:

(i) it is now well established that as a general rule, once a car under the hire purchase agreement has been forfeited or the insurance company has no good title, it will be in breach of s 7(1) of the Hire Purchase Act 1967;

(ii) reliance was also placed on the High Court decision of *Public Finance Bhd v Ehwan bin Saring* [1996] 1 MLJ 331; [1996] 1 CLJ 628 ('*Saring*'s case') where on similar facts it was held that as a consequence of the seizure of the vehicle by the Customs, the agreement had become void under s 57(2) of the Contracts Act 1950 as it would be impossible for the financier to make over all its rights, benefit and interest in the vehicle as it had a defective title;

(iii) Her Ladyship adopted the reasoning in *Saring*'s case to the following

effect:

> ... The conduct and action on the part of the appellant (financier) clearly show that when the said agreement was entered into, the appellant (financier) represented that they are the owners of the said vehicle which would mean that they represented that they were capable of giving a good title to the respondent (hirer) whenever the latter decided to pay the net balance due resulting in the terminating of the hiring.
>
> Subsequent to the seizure of the vehicle by the Customs Department the said agreement has become void under s 57(2) of the Contracts Act 1950 as it would now be impossible for the appellant to make over all its rights, benefit and interest in the said vehicle as they have a defective title.
>
> It needs to be stressed that in this case the vehicle purchased by the hirer was a used vehicle. As it is my opinion that the obligation to pay the customs duty lies on the owner of the vehicle. As such the customs duty ought to have been paid prior to ownership being transferred to the hirer.
>
> Apart from this as the vehicle is a used vehicle it is not reasonable for the hirer to have any knowledge as to whether there was outstanding customs duty payable.
>
> On the other hand if the vehicle had been imported by the hirer as was the case in *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695 it would be reasonable for the purchaser to pay the import duty.
>
> ...
>
> As such when the vehicle that was hired by the plaintiff vide hire purchase agreement dated 31 May 2012 was seized by the Customs on 15 May 2013, the financier breached his obligation under section 7 of the Hire Purchase Act 1976 (*Ahmad Ismail v Malaya Motor Company* [1973] 1 LNS 1).
>
> The financier's submission that it is the hirer that has breached the terms of the hire purchase agreement by reason of his failure or reluctance to make any further installment payments and termination of the hire purchase agreement lacks merit.

[26] On these grounds therefore, the High Court allowed the hirer's appeal.

THE DECISION OF THE COURT OF APPEAL

[27] As stated at the outset, we allowed the appeal by the financier and disallowed the appeal by the hirer. This is primarily because the learned judge erred in her comprehension of the Federal Court decision in *Ahmad Ismail*

v Malaya Motor Company & Anor [1973] 2 MLJ 66 ('*Ahmad Ismail*'s case') where the Federal Court concluded that there was no violation of the implied warranty under s 7 of the Hire Purchase Act where the subject matter of hire purchase is seized by authorities for non-payment of duties. The learned judge, as set out above, in fact cited this case as authority for the contrary proposition namely that seizure amounted to a violation of s 7 relating to peaceful possession.

[28] In *Ahmad Ismail*'s case, the appellant who was eventually the hirer agreed to buy a second hand car from a car dealer. The appellant turned in his own car and paid a deposit promising to pay the balance later. He then arranged with the second respondent, a finance company, for the hire purchase of the car to him. Subsequently, the car was detained by the police on suspicion for breach of contract. During the course of police investigations the police offered to return the car to the plaintiff subject to conditions. The plaintiff acting on legal advice refused to accept the offer. The plaintiff instead went on to terminate the hire purchase agreement. The facts of this case bear strong resemblance to the facts of the instant appeal.

[29] The claim of the hirer was dismissed in the sessions court and an appeal to the High Court was also dismissed. The appellant (hirer) then appealed to the Federal Court.

[30] The Federal Court dismissed the appeal of the hirer, stating, inter alia, as follows (at p 57 I RHS):

> On behalf of the finance company it is submitted that in all the cases cited on behalf of the plaintiff there was proof that the seller or owner had no title to the goods in question, where here there was only a suspicion that the car had been stolen, that during the course of these proceedings there was only an assumption that there was no proof that the car had been stolen but finally the police cancelled the conditions subject to which the car had been returned to the finance company, that the option by the plaintiff to complete the sale early under s 13 was only hypothetical and that if he had continued to pay all his installments the company would have been able to pass the title to him.
>
> With respect we cannot accept the plaintiff's arguments. In our view the principle enunciated in Universal Cargo Carriers, supra does not apply. The principle there is that anticipatory breach of a contract can occur only if there has been some act by the defendant himself to make it obvious that he has renounced his liabilities under the contract or that it has become impossible for him to perform. Here on the other hand there been no such act by the second defendant. If performance has been made impossible it was not because of their act but because of the intervention of a third party, the police.

[31] In like manner in the instant appeal, there is no wrong doing or failure attributable to the financier in relation to the seizure of the car. If performance has indeed been made impossible, it was not by reason of any act or omission of the financier, but because of the intervention of a third party, namely the Customs. Added to that, the hirer in the instant appeal was accorded the opportunity to regain possession of the car by paying the relevant taxes, very like Ahmad Ismail's case. This he refused to do. Given the undertaking and indemnity by the hirer as set out above, it is evident that the hirer cannot fault the financier for the loss of quiet possession of the vehicle. The hirer's recourse is against the dealer, not the financier. Further the hire purchase agreement, as succinctly pointed out by the learned sessions judge, expressly provides for the hirer to make good and ensure timely payment of all duties and taxes, which would include customs taxes.

[32] Therefore, the learned judge erred in her interpretation and construction of *Ahmad Ismail*'s case, gleaning a meaning directly opposite to the principle to be obtained from the case. This occasioned an error in the application of the principle in *Ahmad Ismail*'s case to the present case, resulting in a flawed conclusion.

[33] Applying the principle in *Ahmad Ismail*'s case correctly, it follows that the financier cannot be faulted for a seizure or disruption in quiet possession caused by a third party. It is only where the financier is itself directly responsible for the disruption of quiet possession that it can be said that there is a breach of this implied warranty on its part.

[34] A similar principle is to be gleaned from the decision of this court in *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695. In that case, the first defendant who was the hirer placed an order with one Primakar Sdn Bhd, the dealer, for a BMW motor vehicle to be imported into the country. The order form was signed by the dealer's managing director. The hirer then obtained finance from the financier, the plaintiff in the suit for the purchase of the car. The financier duly purchased the car from the dealer Primakar and let it to the hirer pursuant to a hire purchase agreement.

[35] The car was later seized by the Customs for default in the payment of the duties owed in respect of the vehicle.

[36] The hirer then defaulted in paying the instalments under the hire purchase agreement whereupon the financier brought an action against, inter alia, the hirer to recover the sums due under the hire purchase agreement. The hirer defended the action on the principal ground that the financier had sold a car to which it had no title and that the seizure of the car frustrated the contract

so that the parties' rights should be adjusted in accordance with s 15(3) of the Civil Law Act 1956. They also brought a counterclaim for the loss suffered by the seizure of the case. The High Court found in favour of the financier in respect of both defences and dismissed the hirer's counterclaim. The hirer appealed.

[37] In upholding the decision of the High Court, this court held, inter alia, as follows at p 700 of the judgment (para 3):

> ... In the first place, there is no doubt — as found by the judge — that Primakar was acting as the first defendant's (hirer's) agent for the importation of the car. Indeed, cl 9 of the hire purchase agreement makes it clear that the importer or dealer shall be the first defendant's agent. So if there was any obligation to ensure that all duties payable on the car to Customs were paid squarely lay on Primakar. Since Primakar failed to pay the duties such failure would bind the first defendant; not the plaintiff. It follows that on a reading of the hire-purchase as a whole, there was no promise by the plaintiff that it would ensure that all duties due would be paid. In the absence of a clearly worded provision in a hire purchase agreement imposing such an obligation, courts should not do so. For it does not accord with commercial reality that a finance provider in a hire purchase transaction involving an imported car should be made to undertake such an onerous obligation. Hence cl 9. The clause warranting title has no application to the facts of this case as the plaintiff did have good title of the car. It was not for want of title that the car was seized. It was seized because duties had not been paid.

[38] In like manner in the instant case, the vehicle belonging to the hirer was not seized for want of title on the part of the financier. It was seized because duties had not been paid.

[39] In *Guan Aik Moh* Gopal Sri Ram JCA (as he then was) also dealt with the issue of frustration and explained why this defence also failed. This is what he said:

> With that I now turn to the second point in the case, namely the issue of frustration. Although this caused me some initial anxiety I have, after considering the relevant law, come to the conclusion that the doctrine has no application to the facts of this case. The starting point is s 57 of the Contracts Act 1950 which provides:
>
> (1) An agreement to do an act impossible in itself is void.
>
> (1) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> (2) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make

compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise."

At p 703:

[7] It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically injust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

At p 704:

[8] Now test the facts of the present instance for these three elements and you will find two of them absent. First, this is a case in which the parties specifically provided for the event relied on by the first defendant as promisor. It is to be found in cl 3(b) of the hire-purchase agreement which states that 'the hirer (that is to say the first defendant) shall indemnify the owner (the plaintiff) against the destruction or loss of goods (including lawful forfeiture)'. Here there was a lawful forfeiture by the Customs. The risk of that happening was allocated to the first defendant to have ensured that the duties were paid by its agent. It did not. It merely relied on its agent to make payment. That did not happen. So, if this is a case of frustration then it was self induced. For that reason, again s 57 does not apply.

[40] It follows from the foregoing that frustration does not come into play on the facts of the instant case. Neither is the hire purchase agreement rendered void and unenforceable as found by the learned High Court judge. Her Ladyship erred in her reasoning to that extent.

[41] Again this court in *AmBank (M) Bhd v Pang Tee Chiang @ Phang Nyiok Pan and another appeal* [2012] 1 MLJ 484; [2012] 1 CLJ 206 held on similar facts as follows:

[15] The hirer submitted that by reason of the seizure of the vehicle by the Customs Department there was a violation of the implied warranty of quiet possession of the vehicle as provided for under s 7(1)(a) of the Hire Purchase Act, 1967.

[16] On this issue also, the learned judge found in favour of the owner ie on the facts of this case, it is clear that the deprivation was caused by the Customs Department and not the owner; therefore the owner is not liable for the violation of the implied warranty. On this issue the learned judge concluded that 'in the circumstances the basis of the claim of the Hirer is not sustainable'. This court agrees with this finding (see also *Hong Leong Bank Bhd v Chee Kok Weng (Next Car Sdn Bhd (Third Party) & Chee Kok Weng (Fourth Party)* [2012] MLJU 289; [2012] 8 CLJ 89).

[42] In *Malayan Banking Bhd v Noor Aziah bt Ab Hana* [2014] 6 MLJ 668; [2014] 6 CLJ 809 it was held as follows at p 816 (MLJ) and p 819 (CLJ):

> Appellant's Duty
>
> [17] The learned judge had found that the appellant had the duty to ensure that the chassis number of the vehicle had not been tampered with before hiring. With respect we do not agree with the learned judge for the following reasons. It should be noted that in a hire purchase agreement, the financier is actually not the owner of the vehicle in the true sense of the word. What usually happens in reality as in this case is that the hirer usually sourced out the second hand vehicle to be purchased and the financier like the appellant only comes into the picture when there is a request for finance. ... And in granting financial help, the appellant in fact had relied on the representation by the respondent that there is no defect whatsoever in respect of the ownership of the vehicle. To expect the appellant to ensure the vehicle is not tampered with where in fact the vehicle was sourced out by the respondent does not make commercial sense and is unreasonable.
>
> ...
>
> [22] We would refer to *Ahmad Ismail v Malayan Motor Company & Anor* [1973] 1 MLJ 117; [1972] 1 LNS 5. The Federal Court in that case dismissed the claim of the hirer of a second hand vehicle against the finance company when the performance of the contract was rendered impossible to perform due to intervention by a third party which was the police who had seized the vehicle on suspicion of it being stolen. The hirer's claim was premised on the implied condition that the finance company would pass good title of the vehicle to the hirer. The Federal Court held that when the deprivation of the aforesaid implied condition is not occasioned by the finance company/owner, it is therefore not liable. Similarly here, there is no evidence that the appellant was a party or even in any way aware of the tampering and thus could not be held liable for any loss suffered by the respondent.

[43] It is clear from the body of authorities set out above that the financier in a hire purchase transaction does not, in the absence of a clear contractual provision, bear or undertake to bear customs duties or taxes for vehicles which are the subject matter of hire purchase agreements which it had agreed to finance. This does not accord with commercial reality.

[44] The duty or obligation to do so lies (contractually generally) with the hirer or the dealer. It is therefore clear on the facts of this case that the learned High Court judge erred in law and in fact in allowing the hirer's appeal in part. For the reasons above we allowed the financier-appellant's appeal.

[45] We dismissed the cross-appeal because the learned High Court judge rightly dismissed the hirer's claim seeking a refund of the deposit paid.

Appellant's appeal allowed; respondent's cross-appeal dismissed.

Reported by Dzulqarnain Ab Fatar